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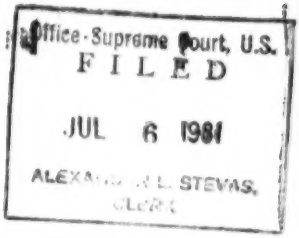

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DAVID M. WOLLMAN, PETITIONER

V.

JAKE GROSS, JR, RESPONDENT

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

* *

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

* *

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the conduct of the Government and of its employee, the negligent tortfeasor, in failing to report an F.T.C.A. automobile claim to the employee's superiors (as required by the ASCS Regulations and 28 C.F.R. 15.1) and in further causing the plaintiff to deal exclusively with the employee tortfeasor's private insurance carrier resulting, through plaintiff's blameless ignorance, in the plaintiff's failing to discover than an F.T.C.A. claim was available until more than two years of the date of the injury, operates to postpone the accrual of the cause of action (thusly extending the time for filing the F.T.C.A. claim) until the plaintiff is first reasonably able to discover the "critical fact" that the United States was a possible defendant.

II.

Whether when through a plaintiff's blameless ignorance of a defendant tortfeasor's role as a federal employee (acting within the scope of employment at the time of the accident) suit is commenced in state court (instead of filing an F.T.C.A. claim with an administrative agency) the commencement of the state court lawsuit operates as the administrative filing.

III.

Whether the United States in substituting itself in the place of an F.T.C.A. defendant employee (who has failed to properly report the F.T.C.A. claim to his federal superiors) becomes entitled to assert the statute of limitations when the defendant employee himself would be deemed to have waived it.

LIST OF ALL PARTIES TO THE PROCEEDING

1. David M. Wollman Plaintiff and Petitioner
2. Jake Gross, Jr., Defendant (Federal Employee
3. United States of America, Substituted Defendant
4. Western Casualty and Surety Company, Fort Scott, Kansas, (the private insurer of Jake Gross, Jr.) appearing by permission of the district court through Timothy J. Nimick, Attorney at Law, Sioux Falls, South Dakota. While the private insurer is technically not a named party, its interest was acknowledged by the district court and Mr. Nimick was given standing to appear in the courts below.

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW :

The decision of the district court for the Southern District of South Dakota in Wollman vs. Gross is reported at: 484 F. Supp. 598.

The decision of the three-judge panel, Eighth Circuit Court of Appeals, is reported at 637 F. 2d 544.

The order (without opinion) denying rehearing dated April 9, 1981, with the dissenting opinion of four members of the court (per The Honorable Chief Judge Lay) is as yet unreported and is reproduced in the appendix at page 72 thereof.

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

(i) This petition prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Eighth Circuit entered and filed December 31, 1980.

(ii) Rehearing was denied by an order entered and filed April 9, 1981.

(iii) No cross petition for writ of certiorari has been filed under Rule 19.5 as of this time.

(iv) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. 1254.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS WHICH THE INSTANT CASE INVOLVES ARE CITED AS FOLLOWS:

A. 28 U.S.C. 1346(b)

B. 28 U.S.C. 2401

C. 28 U.S.C. 2671

D. 28 U.S.C. 2675

E. 28 U.S.C. 2679

F. 28 C.F.R. 15.1(a)

G. A.S.C.S. Regulations (11-19 inclusive) Re: Accidents

The provisions involved herein are lengthy. Their citation alone is provided at this point, and the pertinent text is set forth in the appendix required by Supreme Court Rule 21 (1) (k).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY (SHOWING JURISDICTION IN DISTRICT COURT)

This action was commenced in state court by the service of summons upon Jake Gross, Jr., on January 29, 1979. The defendant answered through Timothy J. Nimick, Sioux Falls, South Dakota, on the 16th day of February, 1979, and again in an amended answer (alleging in essence for the first time The Federal Driver's Act as a defense) on February 21, 1979.

On March 23, 1979, the U.S. Attorney filed and served an F.T.C.A. petition for removal pursuant to 28 U.S.C. 1346(b), which vests jurisdiction in the district court. On March 29, 1979, the United States Attorney also filed and served a motion to dismiss the action for failure of the plaintiff to first present an administrative claim before filing the

action. On July 16, 1979, the plaintiff filed a Federal Tort Claim letter with the United States Department of Agriculture. On July 18, 1979, the plaintiff filed a motion to remand the case to state court.

A hearing on all issues was heard by the District Court, The Honorable Fred J. Nichol presiding, on August 29, 1979. The decision of The Honorable Fred J. Nichol was rendered on February 20, 1980, and the District Court's order denying plaintiff's motion to remand and granting the government's motion to dismiss was entered on February 21, 1980.

Notice of the appeal with undertaking was filed and served on March 31, 1980. Thereafter, the matter was briefed and argued to the Eighth Circuit Court of Appeals, which rendered its decision affirming the District Court's order dated February 21, 1980. Petition for rehearing, with

the suggestion that the matter be reheard en banc, was filed on January 20, 1981. The petition was denied on April 9, 1981, by an equally divided court, The Honorable Chief Judge Lay dissenting, joined by The Honorable Judges Bright, McMillian and Arnold.

II. FACTS:

The plaintiff and defendant were both farmers living on farmsteads 1 1/4 miles apart in Hutchinson County, South Dakota, and had known each other for many years. The plaintiff had worked for the county A.S.C.S. office as a crop appraiser on a piecework basis, and the defendant had overseen his work.

On the day of the accident the defendant had gone to Mitchell, South Dakota, in line with his duties as district director. He had completed all of

his duties by approximately 3:00 o'clock p.m. He then got into his automobile and drove towards his home. The trip to and from Mitchell was part of the itinerary he planned for himself. The defendant had been completely done with all of his duties for approximately one hour prior to the accident.

At approximately a few minutes before 4:00 o'clock p.m. on Friday, June 11, 1976, at a point approximately one-half mile from the defendant's farmstead on County Road 13, Hutchinson County, South Dakota, the eastbound defendant negligently drove his automobile across the center line, causing it to collide with the westbound vehicle owned and driven by the plaintiff. The defendant was driving towards his farmstead in his own vehicle, which had private license plates thereon and which was insured by the defendant's private in-

surance carrier.

The plaintiff's automobile was totaled, and the defendant sustained permanent bodily injuries of a whiplash variety.

The defendant turned the matter of the accident over to his private insurance company for defense. He did not report the accident to the state A.S.C.A. office, nor did he follow any of the procedures required for reporting an accident which occurs within the scope of employment as required by 28 C.F.R. 15.1 and by his departmental regulations (see appendix, page 93). No mention was made of the fact that defendant was working at the time of the accident in a federal capacity (until defendant filed his amended answer in the state court lawsuit). As a result, the defendant's insurance company negotiated with the plaintiff from June 21, 1976,

until liability was denied (not on grounds of the Tort Claims Act) on January 4, 1979, shortly after which time the state court action was commenced. The negotiations consisted of the exchange of medical information as it was acquired and the rendering of correspondence by the insurance company on several occasions in representation of its insured, the defendant, Jake Gross, Jr. The state court action was commenced more than two years after the accident, and within the three-year state statute of limitations in South Dakota for negligence actions.

That until approximately the time of the service of the amended answer by Attorney Timothy J. Nimick, the lawyer hired by the insurance company to defend the defendant, neither the defendant's insurance company nor Mr. Nimick had any idea that the defendant at the time of the ac-

cident might have been a federal employee working within the scope of his employment. The plaintiff and his counsel were allowed by the defendant to deal exclusively with the insurance company.

The facts of the defendant's employment and the use of his automobile are as follows: That the defendant did not work in the state Agricultural Stabilization and Conservation Service (A.S.C.S.) office in Huron, South Dakota, but was, instead, the district director for the A.S.C.S. office, in charge of the supervision and review of programs for ten county offices within the State of South Dakota. His duty station had recently been changed to his home in rural Freeman, South Dakota. He was authorized, but not required, to use his own private vehicle for checking up on the various county offices. He could have taken any mode of

transportation he chose in the administration of his duties. He planned his own itinerary two weeks in advance. No one controlled him in the details of his work. The position of the district supervisor, which is essentially a co-ordinator between the county A.S.C.S. offices and the state office had never before been adjudicated as one of a federal employee for F.T.C.A. purposes. Subordinates to that office have been found not to be federal employees while superiors to that office were federal employees.

The prosecution of the lawsuit involved little difficulty by way of liability, but substantial difficulty in the diagnosis and prognosis of the nature and extent of plaintiff's bodily injuries; further, that plaintiff's counsel in attempting to adequately diagnosis plaintiff's condition for purposes of computing

a sum certain so that the case might be settled or litigated, sent the plaintiff to numerous physicians, receiving from the last physician, Dr. Koob, a neurologist, a written report dated July 26, 1978 (which is more than two years after the date of the accident).

The United States Department of Agriculture never responded to the letter of Administrative Claim filed on July 16, 1979.

REASONS FOR GRANTING THE WRIT

1. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN ITS DECISION IN THE INSTANT CASE HAS DIRECTLY CONFLICTED WITH KELLEY VS.THE UNITED STATES 568 F.2d 259, (2d Cir. 1978) ON EXACTLY THE SAME ISSUE.

This fact formed the basis of the dissent of the Honorable Arlin M. Adams to the panel opinion and the dissent of the Honorable Judges Lay, Bright, McMillian, and Arnold in the dissent (authored by Chief Judge Lay) to the denial of the Petition for Rehearing en banc.*

*Judge Adams being a visiting Judge for the Third Circuit who sat on the panel by designation did not have a vote on the question of whether or not to grant a Petition for Rehearing in the instant case. We, therefore, have the anomaly that by the luck of the draw the Petitioner has lost this case at the Court of Appeals level even though five of the nine Court of Appeals Judges who considered the case were obviously of the opinion that the Petitioner's cause was meritorious.

Kelley stands essentially for two propositions. First that the filing of a suit against an individual employee in State Court should satisfy the exhaustion requirement under the FTCA. Second, that blameless ignorance on the part of a reasonably diligent plaintiff is a sufficient reason to postpone the accrual of the FTCA Statute of Limitations. The latter proposition will be discussed in Part 2 hereof.

Concerning the exhaustion requirement, Judge Lay in his dissent to the denial of the rehearing in the instant case, referred to Meeker vs. United States 435 F.2d 1219 (8th Cir. 1970) and its progeny. Meeker (upon which the instant case is based) is also diametrically opposed to Kelley. Judge Lay stated in his dissent in the instant case:

> "I sense that the analysis in Kelley demonstrates that Meeker (an opinion in which I participated) was wrongly decided. The filing of the suit against the individual employee in State Court should satisfy the

exhaustion requirement under the FTCA."

In quoting Kelley, supra., at 568 F.2d, 267-68, Judge Lay referred to 28 U.S.C. §2679(b), which provides for removal of a suit to the Federal Court and recited:

> "It is far truer to the language to read it as implying that the removed case is to continue to judgment on the merits as a tort case against the United States subject only to one condition: that it is not found on pre-trial motion that the employee was acting beyond the scope of his employment... in which case the case is remanded."

Judge Lay stressed that since 28 U.S.C. §2679(e) and 28 C.F.R. §15.1 assure the prompt presentation of lawsuit papers to the appropriate officers of the government that no good reason exists for not considering the service of a complaint to be an adequate claim making procedure.

With the Second Circuit, one-half of the Eighth Circuit, and one visiting Judge (Adams) being strongly convinced that Kelly demands a reversal of the instant case the petitioner believes himself to be in

good company in requesting that his Petition for Writ of Certiorari be granted. The question should be answered once and for all.

2. THE DECISION IN THE INSTANT CASE IS IN CONFLICT WITH KELLEY, SUPRA., (SECOND CIRCUIT), UNITED STATES VS. LEPATOUREL, 593 F.2d 827 (8th Cir. 1979) (en banc) AND UNITED STATES VS. KUBRICK 444 U.S. 111 (1979).

Judge Adams and Judge Lay in their aforementioned dissents amply pointed out how the panel decision has misapplied the principles of Kubrick. Kubrick, when reduced to its simplest terms stands merely for the proposition that "ignorance of the law is no excuse". Kubrick also implies that ignorance of the "critical facts" will be an excuse (which will postpone accrual of an FTCA Cause of Action) if the plaintiff has been reasonably diligent.

In Kubrick the plaintiff knew everything he could possibly want to know

about the "facts" of his injury. Still he did nothing about pursuing his legal remedies.* It was obvious to Kubrick that the doctors were working within the scope of their employment in the VA Hospital and Kubrick, therefore, was not under the disadvantage which accrued to the plaintiff in the instant case.

In the instant case it was not "ignorance of the law" which was the problem but it was ignorance of the critical fact that the defendant was at the time of his accident working within the scope of his employment as a federal employee. Indeed, the defendant did not assume that stance until after he was sued and had initially answered the lawsuit through the lawyer appointed by his private insurance company.

*Kubrick did, however, pursue Veteran's Benefits during the period of time he should perhaps have been pursuing his FTCA claim as well. He recovered $50,000.00 from his Veteran's Benefits.

The private insurance company even paid for the damage to the plaintiff's vehicle which it obviously did not have to do under the Federal Tort Claims Act.

In many cases, under different facts than are here present, a plaintiff who knows a defendant's place of employment might be reasonably expected to uncover the fact that the defendant was or was not working at the time of the accident. Here, however, because the defendant's conduct lulled the plaintiff into a false sense of security (that the defendant was acting in a private capacity) this plaintiff could not reasonably be expected to uncover that fact (other than perhaps through luck as opposed to diligence.) As Judge Lay stated in his aforementioned dissent:

> "Wollman, injured in a car accident by Gross, diligently pursued his claim with Gross' insurer, which immediately reimbursed Wollman for damages to his car. ...Wollman was literally lulled into a false sense of security by Gross and his insurer who negotiated his claim with him, perhaps in good faith for over two years.

Gross and his insurer, not Wollman were the ones who slept on their rights. Gross and his insurer did not report the accident to the government or deliver Wollman's claim to the government as required... ."

Therefore, the instant case, unlike Kubrick, is a "blameless ignorance of a critical fact" case and the correct application of Kubrick would result in the postponing of the accrual of the plaintiff's Cause of Action until the plaintiff learned or reasonably should have learned of the "critical fact" that the defendant was working within the scope of his federal employment at the time of the accident.

It is extremely important to remember that the Supreme Court in Kubrick did not designate the accrual of Kubrick's Cause of Action as being the time of his injury (1968), but rather it designated that the accrual occured in 1969 when Kubrick first learned the last unknown critical fact that neomycin caused his injury. Under the

panel decision's misapplication of Kubrick, Kubrick's Cause of Action would have accrued in 1968 at the time of the injury rather than in 1969 when he learned the critical facts which were important to his particular lawsuit.

As pointed out by Judge Lay the instant case even contravenes the en banc decision of LePatourel, supra.(8th Cir. 1979). The plaintiff in that case did not bring suit for almost six years but diligently pursued his remedies. Judge Lay stated:

> "I cannot accept the distinction the panel makes of LePatourel from the facts existing here. ...there is no compelling reason why we should not reach the same result as in LePatourel."

In sum on this point, the Courts of Appeals of at least the Eighth and Second Circuits are diametrically opposed on this point and this exact question, while not having been directly answered by a United States Supreme Court case contravenes the correct application of the Kubrick case, such

that a clarification of the principles of Kubrick has become necessary to clear up the confusion.

3. THE UNITED STATES HAS WAIVED THE STATUTE OF LIMITATIONS OBJECTION IN THE INSTANT CASE.

Judge Lay pointed out in his dissent that while the Statute of Limitations is ordinarily not subject to being tolled or subject to estoppel it may be waived. Judge Lay stated:

> "It is the United States that has intervened in the State Court, substituting itself in place of the individual employee. When it does so, at a date past the time of the (FTCA) Statute of Limitations, it seems that a realistic interpretation of sub-sections (28 U.S.C.) 2679 (b) and (d) would require the government to take the original suit as it finds it; the original suit should be deemed to have been initiated against the United States for purposes of determining whether it was brought within the proper Statute of Limitations. (Emphasis added)."

CONCLUSION

In conclusion on the foregoing points it is worthy of note that this entire

injustice resulted from the fact that a letter of claim was transmitted to the Department of Agriculture on July 18, 1979 instead of on June 11, 1978. No prejudice whatsoever from the delay accrued to the government. More importantly, once the government had received the letter of claim nothing happened. The letter was never responded to. It would be, indeed, a gross injustice if this diligent plaintiff were deprived of his day in court as the result of such a meaningless omission. That the real question in this case is whether rhetoric will be allowed to put government out of the reach of its people by imposing upon its citizens a standard which very few people would be able to meet and compliance with which would depend upon the greatest of luck.

For these reasons a Writ of Certiorari should issue to review the

judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted on this 3rd day of July, 1981.

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81-33

NO.

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APPENDIX TO

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1204

David M. Wollman,	*	
	*	
Appellant,	*	
	*	Appeal from the
v.	*	United States Dis-
	*	trict Court for the
Jake Gross, Jr.,	*	District of South
	*	Dakota
Appellee.	*	
	*	

Submitted October 15, 1980

Filed December 31, 1980

Before HEANEY, ADAMS,* and STEPHENSON, Circuit Judges

STEPHENSON, Circuit Judge.

This case arises from an automobile accident between plaintiff-appellant David Wollman and defendant-appellee Jake

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*The Honorable Arlin M. Adams, United States Circuit Judge for the Third Circuit Court of Appeals, sitting by designation.

Gross, Jr. The case was removed to federal district court[1] from South Dakota state court on petition by the United States Attorney contending that the United States was the proper defendant under the Federal Tort Claims Act (FTCA) because Gross was a federal employee acting within the scope of his employment. After a hearing the district court refused to grant Wollman's motion to remand to state court, determining that Gross was a federal employee acting within the scope of his employment at the time of the accident. The district court then dismissed the suit because an administrative claim had not been presented within two years of the date of the accrual of the claim as required by the FTCA. We affirm.

---

[1]The Honorable Fred J. Nichol, Senior District Judge (then Chief Judge) of the United States District Court for the District of South Dakota.

The district court opinion presents a good summary of the facts underlying this case:

> The case arises out of an automobile accident on June 11, 1976, between plaintiff, David Wollman, and the named defendant, Jake Gross, Jr. The plaintiff and the defendant are lifelong neighbors who live about one and one-half miles apart near Freeman, South Dakota. On the date of the accident the defendant Gross was employed by the Argiculture Stabilization and Conservation Service (ASCS). He was the District Director for the ASCS State Office in charge of the supervision and review of programs for ten county offices within the state of South Dakota. It was for the purpose of checking the Davison County ASCS office in Mitchell, South Dakota, that the defendant left his home in his personal car on June 11, 1976. Mr. Gross'home was his assigned duty station and he received mileage reimbursement from the government for such trips. After finishing his work at the ASCS office in Mitchell, he drove toward his home duty station by the most direct route without deviating for any personal business. The accident occurred around 4:00 p.m. on County Road 13 between the farmsteads of the plaintiff and the defendant.
>
> Neither the plaintiff nor the defendant realized that defendant Gross was driving as a federal employee within the scope of his em-

> ployment. Defendant Gross did not report the accident to his administrative office and his personal insurance company began dealing with the plaintiff. On January 25, 1979, more than two years after the accident, the plaintiff filed a complaint in state court naming Jake Gross, Jr., individually, as defendant. The involvement of the United States Government was first recognized by the counsel of the defendant's personal insuror somewhere in mid-February, 1979. The case was removed to federal court by the United States Attorney on March 23, 1979. On March 29, 1979, the United States filed a motion to dismiss for lack of jurisdiction due to the untimeliness of any administrative claim. The plaintiff then sent an administrative claim to the United States Department of Agriculture dated July 16, 1979, and on July 18, 1979, filed with this court a motion to remand to state court.

Wollman v. Gross, 484 F. Supp. 598, 600-01 (D.S.D. 1980)

On appeal Wollman contends the district court erred in determining that: (1) Gross was a federal employee; (2) Gross was acting within the scope of his federal employment at the time of the accident; (3) a Federal Tort Claim was not

filed within two years from the time the cause of action accrued; and (4) this case did not fall within the rationale of United States vs. LePatourel, 593 F 2d 827 (8th Cir. 1979), requiring a postponement of the accrual date of the claim.

We are in agreement with the district court that Gross was a federal employee acting within the scope of his employment at the time of the accident. After a careful consideration of the record and briefs and arguments of the parties concerning this issue, this court has concluded that the decision of the district court is based on findings that are not clearly erroneous and that no error of law appears. The district court's decision on these issues is therefore affirmed on the basis of the court's well-reasoned opinion. See Wollman v. Gross, supra, 484 F. Supp. at

601-03. It is noted that while the question of scope of employment is one of state law for which there has been no analogous cases cited under South Dakota law, great weight is given to the local district court's view of state law. See, e.g., Duke v. Hartford Fire Insurance Co., 617 F 2d 509, 510 (8th Cir. 1980); Foremost Insurance Co. v. Sheppard, 610 F. 2d 551, 554 (8th Cir. 1979). Wollman has not shown that the district court's determination that Gross was acting within the scope of his employment to be in any way inconsistent with the law of South Dakota.

We also agree with the district court that the filing of the administrative claim was untimely and therefore the claim was properly dismissed. Because of the harshness of this result to Wollman, however, further comment is appropriate.

The district court properly held that because Gross was a federal employee acting within the scope of his employment, plaintiff's exclusive remedy is against the United States under the FTCA. 28 U.S.C. §2679(b). The FTCA waives the sovereignty of the United States, and the courts in construing the statute of limitations, which is a condition of that waiver, should not extend the waiver beyond that which Congress intended. United States v. Kubrick, 444 U.S. 111, 117-19 (1979). Nor, however, should the courts assume the authority to narrow the waiver. Id. Prior to bringing a suit a claim must be presented in writing to the appropriate administrative agency "within two years after such claim accrues." 28 U.S.C. §§2401(b); 2675(a).

Wollman's administrative claim was filed more than two years after the

accident occurred, but Wollman argues the accrual date should not be the date of the accident, June 11, 1976, but instead the date Wollman discovered facts which put him on notice that Gross may have been a federal employee acting within the scope of his employment. Wollman contends that latter date is approximately February 22, 1979, when plaintiff received defendant's amended answer alleging he was an employee of the federal government. Wollman argues he had been diligent in bringing this lawsuit within the state three-year statute of limitations. The state suit was filed more than two years but less than three years after the accident.

The district court stated the current status of the law concerning the accrual of a federal tort claim

> The general rule under the Act has been that a tort claim for personal injury or property damage resulting from the negligent operation of a motor vehicle by a government employee accrues at the time of the injury "when the injury coincides with the negligent act and some damage is discernible at that time." Steele v. United States, 599 F. 2d 823, 828 (7th Cir. 1979); Mendiola v. United States, 401 F 2d 695, 697 (5th Cir. 1968). However, the courts have recognized that there are circumstances when a claim accrues at a later time. For example, in medical malpractice actions where the injury and the cause are not immediately known and actions where new law applied retroactively has created a new basis for a claim, the time of accrual has been postponed. Neely v. United States, 546 F. 2d 1059, 1069 (3rd Cir. 1976); United States v. LePatourel, 593 F 2d 827, 830 (8th Cir. 1979); United States v. Kubrick, (444 U.S. 111 (1979).

Wollman v. Gross, supra, 484 F. Supp. at 603-04

Wollman argues the time for accrual of the claim should be extended on the basis of both (1) the doctrine of blameless ignorance,"[2] and the rationale

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[2] See note 4 and accompanying text infra.

of United States v. LePatourel, supra.

LePatourel does not control this situation. In that case, this court ruled for the first time that federal judges were federal employees for purposes of the FTCA. The court en banc then held that this ruling was a "novel question of federal law" which would not be applied retroactively and therefore the claim did not accrue until this court's declaration that federal judges were federal employees under the FTCA. 593 F 2d at 831-32. It is our view that the judicial determination that Gross was a federal employee acting within the scope of his employment presents no "novel question of law." Further, there is no basis for extending LePatourel to "novel questions of fact" as suggested by Wollman.[3]

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[3]Wollman also argues Neely v. United States, 546 F 2d 1059 (3d Cir. 1976) establishes that the accrual of a cause of action should be postponed if the claim was

Wollman also contends the doctrine of "blameless ignorance" should apply in this case. This doctrine was enunciated by the Supreme Court in Urie v. Thompson, 337 U.S. 163, 170 (1949) and applied to FTCA cases in Quinton v. United States, 304 F 2d 234 (5th Cir. 1962). Its primary application has been in medical malpractice cases.[4]

"inherently unknowable" at accrual. That case postponed the accrual on the basis of an "inherently unknowable" proposition of law, that being the express overruling of authoritative precedents by the United States Supreme Court. There is no similar "inherently unknowable" question of law involved in the instant action.

[4]This circuit approved of Quinton in Reilly v. United States, 513 F. 2d 147 (8th Cir. 1975). Urie and Quinton were relied on by some courts, e.g., De Witt v. United States, 593 F. 2d 276 (7th Cir. 1979) Exnicious v. United States, 563 F. 2d 418, 420, 424 (10th Cir. 1977); Bridgford v. United States, 550 F 2d 978, 981-82 (4th Cir. 1977); and Jordan v. United States, 503 F 2d 620 (6th Cir. 1974), which held or indicated in dictum that a malpractice plaintiff under federal law must be aware of the legal implications of the facts, as well as the facts themselves, before the

It is our view that United States v. Kubrick, supra, 444 U.S. 111 (1979) limits this doctrine and forecloses Wollman's argument in this case that the accrual date should be extended to the point in time that Wollman became aware of the status of Gross as a federal employee.

Kubrick involved a medical malpractice claim where plaintiff had suffered a hearing loss after taking neomycin in 1968. In January 1969, plaintiff was informed by a private physician that neomycin may have caused the hearing loss. Another physician, in 1971, stated that neomycin was the cause of the injury and such treatment should not have been administered. Suit was brought in 1972. The Supreme Court held

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limitations period began to run. The Supreme Court in United States v. Kubrick, 444 U.S. 111 (1979) disagreed and held the cause of action accrues when plaintiff knows of both the existence and cause of the injury.

that the claim accrued in 1969, when plaintiff knew of the existence and cause of his injury and not in 1971, when he also learned that the acts inflicting the injury may constitute medical malpractice. The Court stated:

> The District Court, 435 F. Supp., at 185, and apparently the Court of Appeals, thought its ruling justified because of the "technical complexity," 581 F 2d, at 1097, of the negligence question in this case. But determining negligence or not is often complicated and hotly disputed, so much so that judge or jury must decide the issue after listening to a barrage of conflicting expert testimony. And if in this complicated malpractice case, the statute is not to run until the plaintiff is led to suspect negligence, it would be difficult indeed not to apply the same accrual rule to medical and health claims arising under other statutes, where the legal implications or complicated facts make it unreasonable to expect the injured plaintiff, who does not seek legal or other appropriate advice, to realize that his legal rights may have been invaded.

United States v. Kubrick, supra, 444 U.S. at 124.

Even if the doctrine of "blame-

less ignorance" extends beyond the medical malpractice area, a proposition we do not address, Kubrick prohibits the postponement of the accrual date in the instant action. Wollman was aware at the time of the accident that Gross was employed by the ASCS. He was unaware only of the legal significance of this fact. The purpose of the statute of limitations is to require the reasonably diligent presentation of tort claims. This may require a plaintiff to obtain appropriate legal counsel and together with counsel discover the facts and their possible legal ramifications so as to enable plaintiff to bring the suit within a reasonable time. As stated by the Court in Kubrick,

> A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the

> limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government.

Id. at 123.

Admittedly this application of the statute of limitations has especially harsh ramifications here where the record indicates little prejudice to the government if it had to defend this lawsuit. However, to accept Wollman's argument would be in effect rewriting the two-year statute of limitations of 28 U.S.C. §2401 (b) to allow the state statute of limitations to apply whenever plaintiff is unaware of the status of the defendant as a federal employee acting within the scope of his employment. While this may be desirable, Congress has clearly not chosen to do this and any change is its prerogative and not that of the courts.

Wollman also relies heavily on Kelley v. United States, 568 F. 2d 259

(2d Cir.), cert. denied, 439 U.S. 830 (1978). It is far from clear that Kelley is good law in this circuit,[5] but in any event that case is distinguishable from the case at bar.

In Kelley the state suit against the individual had been instituted within the two-year period of 28 U.S.C. §2401 (b) but after the two-year period expired the government moved for removal, to be substituted as the party in interest, and for dismissal for failure to file the administrative claim within two years. The district court found in that case that the government

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[5] Kelley expressly distinguishes and rejects much of the reasoning of Meeker v. United States, 435 F. 2d 1219 (8th Cir. 1970). Meeker, which has never been rejected by this circuit, holds that the FTCA's requirement of filing an administrative claim before bringing suit against the United States cannot be circumvented or satisfied by filing an action in state court against the governmental employee. In Meeker, this court held the suit had been properly dismissed for the failure to file the administrative claim required by 28 U.S.C. § 2675 (a).

had "lull[ed] plaintiffs into a false sense of security by waiting until plaintiffs' time to file an administrative claim had expired and thereupon moved to be substituted and to dismiss." Kelley v. United States, supra, 568 F 2d at 262. The Second Circuit affirmed, characterizing the case as one of "innocent ignorance or ingenuous blunder." Id.[6]

The party who is claiming the benefit of an exception to the operation of a statute of limitations bears the burden of showing that he is entitled to it. De Witt v. United States, 593 F 2d 276, 281 (7th Cir. 1979). Here the state action was not commenced until after the two-year statute of

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[6]We also have some question as to whether Wollman was in fact "blamelessly ignorant." It does not seem unreasonable to expect Wollman, who was aware that Gross was an ASCS employee, to so inform his counsel, or for counsel to then research the status of ASCS employees for consideration of an FTCA claim.

limitations of 28 U.S.C. § 2401 (b) had expired. Wollman has not alleged, nor has a careful examination of the record revealed, activities of the defendant or the United States which would lull the plaintiff into a false sense of security. The most that can be said is that Gross turned the matter over to his private insurer and did not file an administrative report with his superior as he should have.

Wollman never presented a claim to Gross' insurer until November 29, 1978, after more than two years had elapsed. The insurance company then denied liability by a letter dated January 4, 1979. Suit was brought in state court on January 29, 1979. The evidence then indicates that sometime between February 16, 1979, and February 21, 1979, Gross mentioned to his insurer's attorney that he worked for the ASCS. An amended answer alleging this fact was filed

February 21, 1979, and the petition for removal was filed by the United States Attorney on March 23, 1979. Under these circumstances, we cannot say the actions of either Gross or the United States lulled plaintiff into a false sense of security as occurred in Kelley.

In addition to United States v. Kubrick, supra, 444 U.S. 111, the cases cited by the district court, 484 F. Supp. at 604, support our conclusion. See West v. United States, 592 F. 2d 487 (8th Cir. 1979); Steele v. United States, 599 F. 2d 823 (7th Cir. 1979); Lien v. Beehner, 453 F. Supp. 604 (N.D.N.Y. 1978); Baker v. United States, 341 F. Supp 494 (D. Md.), aff'd, (4th Cir. 1972); Driggers v. United States, 309 F. Supp. 1377 (D.S.C. 1970). See also McGowan v. Williams, 481 F. Supp. 681 (N.D. Ill. 1979); Reiser v. Di Pietro, 78 F.R.D. 541 (N.D. Ill. 1978); Fuller v.

Daniel, 438 F. Supp. 928 (N.D. Ala. 1977); Miller v. United States, 418 F. Supp. 373, 377 (D. Minn. 1976).

Accordingly, the district court's order denying a remand of the case to state court and granting the United States' motion of dismissal is affirmed.

ADAMS, Circuit Judge, dissenting.

With full deference to my distinguished colleagues, I respectfully dissent. I do so because I am concerned that once again the law, in hewing rigorously to the written word, may have destroyed its larger spirit and left a harmed and innocent citizen completely remediless.[1]

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[1] O just but severe law! . . .

No ceremony that to great ones (be) 'longs,
Not the King's crown, nor the deputed sword,
The marshal's truncheon, nor the judge's robe

I.

In most respects, I agree with the opinion of the court. The district court's findings that Gross (1) was a federal employee and (2) was acting within the scope of his federal employment were not clearly erroneous. And it cannot be denied that Wollman's filing of an administrative claim was more than two years after the occurrence of the accident. Nevertheless, in focusing literally on the two-year statute of limitations, the majority appears to have sacrificed two central purposes of the Federal Tort Claims Act (FTCA)--protecting

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Become them with one half so good
a grace
As mercy does.
If he had been as you, and you as he,
You would have slipp'd like him;
but he, like you
Would not have been so stern.

Measure for Measure
Act II Sc. 2

federal employees from the burden of tort claims, and providing the injured public with some recompense. I do not believe the FTCA should be subjected to such an unidemensional reading in which its varying objectives are subordinated to the assertedly paramount goal of preserving the sovereign from stale claims.

What we have before us is an injured plaintiff who for two years diligently sought to settle his claims with defendant's private insurer. Wollman was immediately reimbursed by the insurer for damages to his car. Gross and his insurer fully acquiesced in the avenue of recovery that plaintiff had pursued. At no point did they indicate in any way that Wollman should be dealing with someone other than themselves. The defendant never reported the accident to his employer and never treated the matter as though it were a job-

related casualty. Because the defendant willingly participated in a private resolution of the claims, it appears anomalous that he should benefit from belatedly placing the matter in a governmental perspective. Surely, if the legislative history to the 1966 amendment of sections 2675 and 2401 governing federal tort claims contemplated that the administrative filing requirement had "the common purpose of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved with litigation with their Government,"[2] it cannot have intended the result reached by the majority.

II.

I fully realize that Wollman filed his administrative claim more than

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[2] S. Rep. No. 1327, 98th Cong. 2nd Sess., reprinted in [1966] U.S. Code Cong. and Ad. News, 2515-16.

two years after the discovery of his injury. But "when a particular claim accrues within the meaning of the FTCA is a question of federal law which must be determined by the court in light of the surrounding circumstances." United States v. LePatourel, 593 F. 2d 827, 830 (8th Cir. 1979); Steele v. United States, 599 F. 2d 823, 826 (7th Cir. 1979) (noting unanimity among all courts of appeals except for the First Circuit on this issue). As the Kubrick decision itself declares, while the 1966 amendments to the Act indicated that the time of filing the administrative claim was the critical date for limitations purposes, the legislative reports do not further explicate when a tort claim "accrues" within the meaning of 28 U.S.C. § 2401 (b). United States v. Kubrick, 444 U.S. 111, 119 n.6. Thus, to say that a claim accrues upon discovery does not resolve the legal difficulties, for

what should be discovered remains to be ascertained.

Prior to Kubrick, several circuits had held, generally in a malpractice context, that a plaintiff's claim does not accrue until he has a reasonable opportunity to discover all of the essential elements of a possible cause of action--duty, breach, causation and damages. Stoleson v. United States, ___F. 2d___, 49 U.S.L.W. 2220 (7th Cir., Sept. 11, 1980); United States v. Kubrick, supra, 444 U.S. at 120 n.7. (citing cases). Kubrick, however, carefully sought to limit this range of elements to the essential facts of "injury" and "cause" which, once known, would trigger accrual of a claim. Yet precisely because there is a discrepancy between the facts known to Kubrick and those available to Wollman, I find that Kubrick is not controlling here.

In Kubrick the issue was "whether the claim 'accrues' within the meaning of the Act when the plaintiff knows both the existence and the cause of his injury or at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice." 444 U.S. at 113. To put it another way, the Supreme Court appears to have proceeded on the assumption that Kubrick knew the facts and cause of his injury. What Kubrick did not know were the legal implications of his injury--that it had been negligently inflicted and that a legal duty to him had been breached by the Veterans Administration. In holding that "a plaintiff's ignorance of his legal rights" and "his ignorance of the fact of his injury or its cause" are not identical for statute of limitations purposes, the Supreme Court was in essence penalizing Kubrick for his failure to seek professional

advice, and encouraging future litigants to consult with competent counsel. As the Court explained, "A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government." 444 U.S. at 123.[3]

Wollman, quite significantly, did not know a critical fact of his injury. He knew of course that he had been hurt,

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[3]The Court is even more emphatic in a footnote which remarks: "Although he [Kubrick] diligently ascertained the cause of his injury, he sought no advice within two years thereafter as to whether he had been legally wronged. The dissent would excuse the omission. For statute of limitations purposes, we would not." 444 U.S. at 123 n.10.

but he did not know the status of Gross at the time of the injury. Indeed, Gross had created the clear impression that at the time of the accident he was acting in his private capacity. Gross' private insurer reimbursed Wollman for damages to his car and corresponded with Wollman and his lawyer for two years in an attempt to settle his claims for back injuries. In contradistinction, Kubrick knew that "it was highly possible that the hearing loss was the result of the neomycim treatment administered at the [VA] hospital," 444 U.S. at 114, and he even applied to the Veterans Administration for an increase in disability benefits.[4] Wollman, however, had no idea

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[4]As the Supreme Court was careful to note, "the VA Board of Appeals' reconsideration of Kubrick's case in 1975 entitled him to an increase in his disability rating as a result of the use of neomycin." United States v. Kubrick, 444 U.S. at 116 n.5. Kubrick, who received more than $50,000 in augumented disability benefits, was surely nor remediless.

that he should be complaining to a federal agency rather than bringing claims against the party with whom he had collided. Because no one believed that the accident had occurred within the scope of Gross' employment, Wollman can hardly be faulted for not deducing the proper legal course from his admitted knowledge of his neighbor's occupation. Wollman did not fail for want of legal advice to draw an acceptable legal conclusion from the relevant facts; rather no one considered the scope of Gross' employment as an existing or salient fact.

As the district court found, Gross did not report the accident to his supervisor and did not, when he was finally sued, deliver the process served upon him to whomever his head of department had designated to receive such papers, as 28 U.S.C. § 2679 (c) and 28 C.F.R. §15.1 require. Gross' insurer retained counsel to defend

the original state court suit, and although the first answer denied the main allegations of the complaint there was no reference to federal employment nor recourse to the defense afforded by section 2679 (b) to federal drivers whose accidents occur when they are acting within the scope of their employment. The consequence of these extended private negotiations which culminated in a suit that was timely for purposes of the state statute of limitations was that none of the papers in the lawsuit was sent to the U.S. Attorney, the Attorney General or the head of Gross' employing agency, as envisaged by section 2679 (c) and 28 C.F.R. §15.1, until the filing of Gross' second amended answer on February 21, 1979. Thus, Wollman only discovered the dispositive identity of the person who caused his injury--for purposes of the FTCA--more than two years after the fact of injury. Whether the claim is deemed to have accrued when

Gross asserted, in his answer, his status as a government employee or when Wollman learned of the certification by the U.S. Attorney is unnecessary for us to decide, inasmuch as both occurred within two years of the filing of Wollman's administrative claim on July 16, 1979.

The factual context present here, in which neither the plaintiff nor the defendant regarded the defendant as a federal employee at the time of the accident, is analogous to the situation in Kelley v. United States, 568 F. 2d 259 (2d Cir. 1978). There the Second Circuit found that mutual ignorance of the fact that the defendant was a federal driver operating within the scope of his employment was no basis for visiting harsh statute of limitations consequences on a plaintiff. As that court noted,

> [t]he case exemplifies a sub-class of Federal Tort Claims Act cases, a

> sub-class which draws to it no reprobation and invites no special rigor of treatment. It is, simply, one of the not uncommon cases in which a driver of a motor vehicle who is a federal employee is sued individually because the plaintiff did not know that defendant was a federal employee, or did not understand that the employee was on federal business at the time of the accident. The instances in this sub-class of cases are characterized by innocent ignorance or ingenuous blunder. There is nothing here to be discouraged or visited with disaster.

Id. at 262. The same sort of blameless ignorance of the identity aspect of the causal element, which should postpone accrual of a claim, is present in the case at hand.[5]

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[5]This court has rejected the reasoning in Kelley to the extent that it relies upon the third-party practice exception of 28 U.S.C. § 2675 (a) to support its holding that the plaintiff's action, commenced against the individual employee within two years, could be maintained against the United States as substituted defendant even though no timely administrative claim had been made. See West v. United States, 592 F 2d 487, 491 n.3 (8th Cir. 1978). Kelley itself noted that Meeker v. United States, 435 F 2d 1219 (8th Cir. 1970), rejected "the contention that suits commenced as

And it is more appropriate to characterize such a state of affairs as reflecting ignorance of a crucial fact, rather than doubt about whether a legal duty to one had been breached. Because Wollman was unaware of a critical factual predicate of his claim, and not simply unaware that the defendant's actions might constitute actionable negligence, the case would appear to

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suits against Government employees are not within Section 2675's requirement that a claim first be filed with the interested federal agency." 568 F. 2d 259 at 267. Yet, Meeker and West do not present a situation that parallels exactly the one before us here. Meeker involved a collision with a United States Post Office vehicle--government ownership and control were patently obvious. Moreover counsel conceded that should the matter proceed to trial, he expected to recover from the United States Government. 435 F. 2d 1219, 1220-21 & nn.1, 4. The identity of the tortfeasor was clearly not an undiscovered fact. Similarly, in West, the parents of the injured child learned before the two-year statutory period for filing an administrative claim had expired that the allegedly negligent doctor was a governmental employee and that the U.S. Attorney was appearing on his behalf. West v. United States, 592 F 2d 487 (8th Cir. 1979).

be distinguishable from Kubrick. See 444 U.S. at 121 n.8.

III.

Further, and perhaps more important for purposes of differentiating this case from Kubrick, Wollman diligently pursued his claims. While the reasoning in the Kubrick opinion is justified insofar as it is invoked against those who sleep on their rights, the very opposite behavior occurred here. Wollman was not oblivious to the legal implications of his complaints. He believed he had suffered a legal wrong, he sought legal advice, and his counsel and Gross' insurer continuously strove to resolve outstanding issues of negligence and liability. Wollman eventually filed suit well within what he understood to be the applicable limitations period--the three years designated by the state. Therefore, a postponement of the accrual date of Wol-

lman's claim would not frustrate the purpose of the federal statute: requiring a reasonably diligent presentation of tort claims.[6]

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[6]For the same reason this case cannot be equated with Steele v. United States, 599 F. 2d 823 (7th Cir. 1979), in which the plaintiff commenced his suit against the government without first filing an administrative claim with the appropriate agency. The court discredited Steele's claim about his inability to discover the government's involvement as conveniently designed to make his tardy administrative claim appear timely:

> The bar to the plaintiff's action appears not so much the result of the accrual of his cause of action when he suffered the injury, as his waiting until the last minute to take action and his confusion about the proper means of commencing a tort claim against the United States. The two-year limitations period was intended to afford those injured by torts committed by agents of the government a reasonable time to discover the facts, seek legal advice, and prepare their claims. The reasonable inference to be drawn from the history of the plaintiff's claim is that he did not use this time diligently.

599 F. 2d at 829. Wollman, to the contrary, was exceedingly diligent.

Nor is the spectre raised in Kubrick--that a plaintiff could bring a claim at any conceivable future date so long as it was "within two years from the time he receives or perhaps forms for himself a reasonable opinion that he has been wronged"[7] --transferable to the present context. An injured plaintiff pursuing the operator of a motor vehicle as an individual would still have to commence suit within the state statute of limitations which for such torts is at most three years.[8]

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[7]United States v. Kubrick, 444 U.S. at 118. As the Court cautioned: "In this case, for example, Kubrick would have been free to sue if Dr. Soma had not told him until 1975, or even 1980, instead of 1972, that the neomycin treatment had been a negligent act." Id. at 118

[8]The original Statute of Limitations enacted in 1623 imposed limitations of four years for actions of trespass, assault and battery and limited actions of debt, detinue, replevin and actions on the case (predecessors of suits in contract) to six years. Present statutes have by and large retained the same two types of classi-

The ruling by the majority produces an even more paradoxical result: plaintiffs in states with two-year statutes of limitations who are ignorant of the status of the tort-feasor will generally have occasion to repair the deficiency and file a timely administrative claim; in states with three-year statutes of limitations a diligent plaintiff like Wollman, who brings suit after two years but well within three years, will be absolutely barred from redirecting his claim to the appropriate federal agency. Yet as the Report to the 1949 amendment of the original one-year limitations period of the Act indicates, one of the reasons for extending the limitations period to two years was to

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fications, limiting actions in tort to two or three years and actions in contract to six years. See Developments - Statutes of Limitations, 63 Harv. L. Rev. 1177, 1192 (1950).

bring the Act more in line with limitations periods for state tort actions. See Kubrick, 444 U.S. at 119 n.6, citing H. R. Rep. No. 276, 81st Cong., 1st Sess., 1 (1949).[9] Jurisdictions like South Dakota, which sought to provide added protection to their citizens with three-year statutes of limitations may have instead created a system which leaves injured persons remediless, if the majority's view of the FTCA is adopted.

Precisely because the judgment which the Supreme Court sought to impose on Kubrick--namely, the determination whether to sue or not within the period of limitations--would occur in any event within

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[9] It can be argued that where, as it appears here, Congress creates a statute of limitations which simply aims at a legislative redefinition of earlier state statutes limiting tort actions, a construction which relates the statute's application to the existing traditional tort action is most appropriate. Cf. Developments - Statutes of Limitations, 63 Harv. L. Rev. 1177, 1194 (1950).

three years in the present context, the underlying rationale in Kubrick of protecting the government from stale claims is dissipated. Kubrick understandably was concerned with guarding "defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." 444 U.S. at 111. But this purpose would not be subverted by permitting Wollman's claim to proceed, on the basis that it did not accrue until he was apprised of the governmental identity of the person who caused the injuries, and yet was, as a private action, properly filed within the state statute of limitations. The evidence remains intact, the record is complete with doctors' reports and insurance claims, the witnesses are available, and there is no

indication that the diminution in memory between the second and third year after the event is likely to be significant.

Moreover, as this court reasoned in LePatourel, in attempting to balance the equities of permitting a unique plaintiff subgroup to proceed on claims that accrued more than two years after the event against the right of the government to be free of stale claims: "We * * * agree * * * that the class of claimants similarly situated * * * cannot be so large as to threaten the interests protected by § 2401 (b)." 593 F. 2d at 832. Similarly, to allow Wollman to assert his claim would not markedly prejudice the ability of the government to defend.

The only defensible basis for shortcircuiting Wollman's dogged pursuit of a remedy would appear to be the formal

value of a uniform federal rule.[10] Under the principals articulated above, the interaction of the FTCA with the limitation laws of the various states would affect whether claims accrued within two or three years. This would undercut the policy of simple repose for the United States--the undeniable purpose of a two-year limitation --insofar as the government would be subject to slight divergencies resulting from local rules. Cf. Steele v. United States,

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[10] It has been recognized that limitations on private actions against the sovereign, as in the present case, "serve the purpose not so much of fairness as of public convenience." Wollman's remediless position would appear to be a high price to pay for convenience. On the other hand, when the legislature limits the sovereign's right to proceed against private individuals, e.g., in criminal prosecutions, more fundamental values are furthered: "the defendant's special interest in not being compelled to put his freedom and his reputation at the hazard of what is likely to be parol evidence of imperfectly remembered events," as well as the minimal "social utility of punishing crimes long past." See Developments - Statutes of Limitations, 63 Harv. L. Rev. 1177, 1186 (1950).

599 F. 2d 823, 826 (7th Cir. 1979). Yet this vaulting of form over substance contravenes the central compensatory and protective purposes of the Federal Tort Claims Act. As this court has indicated, the dominant purpose of the Act was to end the ancient injustice of tort immunity. "Congress, in waiving the sovereign immunity of the United States, intended that tort victims be compensated for injuries caused by the negligence of governmental employees." United States v. LePatourel, supra, 593 F. 2d at 831. And the specific purpose of the section 2679 (b) defense was "to protect the federal drivers from individual liability and from the necessity of carrying liability insurance." Kelley v. United States, supra, 568 F. 2d at 266. Allowing Wollman to pursue his administrative claim would unquestionably further the compensatory purposes of the Act. Not to do so would create a

perverse incentive for such a plaintiff to prove that the government erred in certifying that Gross was a federal employee acting within the scope of his employment. Such a result obviously undermines the very purpose of section 2679 (b)-(d), which is to insulate federal employees from individual liability. Cf. Kelley v. United States, supra, 568 F. 2d at 266.[11]

IV.

In sum, I cannot agree that the result reached by the majority today accords with the congressional intent embodied in the Federal Tort Claims Act.

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[11] Moreover, to the extent that compensating victims and protecting federal employees from liability are objectives of the FTCA, it would appear only fair that if Gross, as an individual, could be sued during a three-year period, then the government, stepping into his shoes, should acknowledge an equivalent vulnerability.

Accordingly, I dissent

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

CIV 79-4031

David M. Wollman,

Plaintiff,

vs.

Jake Gross, Jr.,

Defendant.

MEMORANDUM DECISION

Mr. N. Dean Nasser, Jr., of Sioux Falls, South Dakota, appeared in behalf of the plaintiff;

Mr. Robert D. Hiaring, United States Attorney, of Sioux Falls, South Dakota, and Pamela L. Wood, Trial Attorney Torts Branch, Department of Justice, of Washington, D.C., appeared in behalf of the defendant;

Mr. Timothy Nimick, of Woods, Fuller, Shultz & Smith, of Sioux Falls, South Dakota, appeared in behalf of the insuror.

The case arises out of an automobile accident on June 11, 1976, between the plaintiff, David Wollman, and the named defendant, Jake Gross, Jr. The plaintiff and the defendant are lifelong neighbors who live about one and one-half miles apart near Freeman, South Dakota. On the date of the accident the defendant Gross was employed by the Agriculture Stabilization and Conservation Service (ASCS). He was the District Director for the ASCS State Office in charge of the supervision and review of programs for ten county offices within the state of South Dakota. It was for the purpose of checking the Davison County ASCS office in Mitchell, South Dakota, that the defendant left his home in his personal car on June 11, 1976. Mr. Gross' home was his assigned duty station and he received mileage reimbursement from the government for such trips. After finishing his work at the ASCS office

in Mitchell he drove toward his home duty station by the most direct route without deviating for any personal business. The accident occurred around 4:00 p.m. on County Road 13 between the farmsteads of the plaintiff and the defendant.

Neither the plaintiff nor the defendant realized that defendant Gross was driving as a federal employee within the scope of his employment. Defendant Gross did not report the accident to his administrative office and his personal insurance company began dealing with the plaintiff. On January 25, 1979, more than two years after the accident, the plaintiff filed a complaint in state court naming Jake Gross, Jr., individually, as defendant. The involvement of the United States Government was first recognized by the counsel of the defendant's personal insuror somewhere in mid-Fedruary, 1979. The case was removed

to federal court by the United States Attorney on March 23, 1979. On March 29, 1979, the United States filed a motion to dismiss for lack of jurisdiction due to the untimeliness of any administrative claim. The plaintiff then sent an administrative claim to the United States Department of Agriculture dated July 16, 1979, and on July 18, 1979, filed with this court a motion to remand to state court. A hearing on the two pending motions was heard by this court on August 29, 1979.

There are two questions to be resolved to determine the outcome of the United States Government's motion to dismiss and the plaintiff's motion for remand:

(1) Whether Jake Gross, Jr., was a federal employee acting within the scope of his employment at the time of the accident, and

(2) Whether the Federal Tort

Claim was presented within two years of the date of the claims accrual?

I. MR. GROSS WAS A FEDERAL EMPLOYEE ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT.

Under the Federal Tort Claims Act, the United States District Courts have exclusive jurisdiction of tort actions where a federal employee involved in an accident is acting within the scope of his employment at the time of the collision. 28 U.S.C. section 2679(b). Determining who is an employee of the government for Federal Tort Claim purposes is a matter of federal law. Pattno v. United States, 311 F. 2d 604 (10th Cir. 1962), cert. den. 373 U.S. 911 (1963). The term "employee of the government" is defined to include "officers or employees of any federal agency" and "persons acting on behalf of a federal agency in an official capacity . . ." 28 U.S.C. section 2671. The critical element in de-

termining when someone is a federal employee is the power of the federal government to control the detailed physical performance of his duties. United States v. Orleans, 425 U.S. 807, 814 (1976); Logue v. United States, 412 U.S. 521, 528 (1973); Gere v. United States, 425 F. Supp. 847, 850 (D.S.D. 1977).

The Agricultural Stabilization and Conservation Service is an agency of the United States established by the Secretary of Agriculture. The ASCS structure has been recognized as a "hierarchy of command" functioning as a government agency under the overriding authority and control of the Secretary of Agriculture and his appointees. Duba v. Schuetzle, 303 F. 2d 570, 571 (8th Cir. 1962). Employees of the ASCS have consistently been recognized as federal employees under the Federal Tort Claim Act. Duba v. Schuetzle, 303 F. 2d

570 (8th Cir. 1962); Gross v. Sederstrom, 429 F. 2d 96, 98 (8th Cir. 1970); Delgado v. Akins, 236 F. Supp. 202 (D. Ariz. 1964); Myers v. Cromwell, 267 F. Supp. 12 (D. Kan. 1967). Contra, Lavitt v. United States, 177 F. 2d 627 (2d Cir. 1949).

Jake Gross, Jr., was at the time of the accident and is now the District Director for the ASCS State Office. He is a full-time civil service employee who is paid by the federal government. He is an Agricultural Program Specialist in charge of the execution of agricultural programs and the supervision of county ASCS offices. He is under the supervision of the State Executive Director of the ASCS. This court finds that Jake Gross is controlled under the Secretary of Agriculture's hierarchy of command within the ASCS structure and is accordingly a government employee.

Unlike the determination of who

is a federal employee according to federal law, this court is bound to apply state law in determining whether or not a federal employee's acts are within the scope of employment. Williams v. United States, 350 U.S. 857 (1955); Davies v. U.S., 542 F. 2d 1361, 1362 (9th Cir. 1976). Although no case decided under South Dakota law is analogous to the facts of the present case, a number of general tenets have been either adopted or noted previously by the South Dakota courts.

In Morman v. Wagner, 63 S.D. 547, 262 N.W. 78, 79-80 (1935), it was determined that an act of an employee done for the benefit of the employer either directly or indirectly is within the general scope of a servant's employment, but an act done to effect some independent purpose of the employee's is not within that scope. Several general principles were also noted in

Alberts v. Mutual Service Casualty Insurance Co., 80 S.D. 303, 123 N.W. 2d 96, 98 (1963). The court first noted the general rule as set out in 57 C.J.S. Master and Servant section 570d(2):

> (C)onduct which the master has specifically directed is within the scope of the servant's employment, but it is not essential that the conduct be specially authorized by the master. . . (A)n act is within the scope of a servant's employment where it is reasonably necessary or appropriate to accomplish the purpose of his employment, and intended for that purpose although in excess of the powers actually conferred on the servant by the master.

Alberts v. Mutual Service Casualty Insurance Co., 123 N.W. 2d at 98. The court then pointed out section 228(1) of the American Law Institute Restatement, Agency 2d:

> Conduct of a servant is within the scope of employment if (a) it is of the kind he is employed to perform, (b) it occurs substantially within the authorized time and space limits; (c) it is actuated at least in part, by a purpose to serve the master.

Alberts, 123 N.W. 2d at 98, and concluded

from American Law Institute, Restatement, Agency 2d section 239 and other case authority that:

> The servant may also be within the scope of his employment in using an instrumentality not expressly authorized to effect a result which he has been ordered by the master to accomplish where the means are not specified . . . and no other means are available . . . or if the means available are not in operating condition . . . . For if the master directs a servant to accomplish a result and does not specify the means to be used, the servant is authorized to employ any usual or suitable means.

Alberts, 123 N.W. 2d at 99.

The plaintiff argues that Mr. Gross was an independent contractor in the use of his automobile even though he is normally an employee in other respects because the government did not have the right as a master to control the use of Mr. Gross' personal car at the time of the accident. The plaintiff relies on a line of cases where because the use of a personal car was permitted by the employer but not re-

quired or reasonably necessary to the performance of any business duties, the employee was found not to be within the scope of employment at the time of the automobile accident. Daugherty v. United States, 427 F. Supp. 222 (W.D. Penn. 1977); Tavolieri v. Allain, 222 F. Supp. 756, 758-759 (D. Mass, 1963); Murphy v. United States, 113 F. Supp. 345, 346 (W.D.N.Y. 1953); Bissell v. McElligott, 369 F. 2d 115 (8th Cir. 1966), aff'g 248 F. Supp. 219 (W.D.Mo. 1965), cert. den. 387 U.S. 917 (1967); Manderacchi v. United States, 264 F. Supp. 380 (D.Md. 1967). But see, Levin v. Taylor, 464 F. 2d 770 (D.C.Cir. 1972); United States v. Farmer, 400 F. 2d 107 (8th Cir. 1968), aff'g 261 F. Supp. 750 (S.D. Iowa 1966). These cases find the use of a personal car to be merely permitted for the employee's convenience where such options as a bus, taxicab, trolley, passenger train, government vehicle, or

walking were equally suitable alternatives.

Even assuming such a premise is the applicable law in South Dakota, these cases are not applicable to the facts of the present case. Mr. Gross' job required him to do a great deal of field travel between various county offices and his official duty station at his farmstead near Freeman, South Dakota. The use of his personal car can be considered reasonably necessary for such a business which required "that a majority of time" be directed to field travel in rural South Dakota where there are few available methods of public transportation. Furthermore, Mr. Gross' use of his personal car was not merely a matter of his personal convenience. The government reimbursed Mr. Gross for his mileage on such trips. An affidavit from Mr. Gross' supervisor finding the use of his vehicle in the scope of employment

stated that "Mr. Gross was authorized to use his private vehicle for transportation since no General Service Authority vehicles were available for him to use and any other suitable transportation would have resulted in a greater expense to the government." Mr. Gross' use of his personal car was not merely a personal decision of his own but an authorized government use for the convenience and benefit of the employer as well as a mode of transportation reasonably necessary to the employee's business duties.

The mere fact that Mr. Gross was allowed to select the precise time and routes he would travel does not make the employee an independent contractor in the use of his car where the act of driving his car is an act within the ordinary scope and course of employment. Standard Oil Co. v. Parkinson, 152 F. 681, 683-4 (8th Cir. 1907). The authority to select when and what routes

to travel can be implied as "usual, customary, and necessary to fulfill the duty intrusted to him by the master." Alberts, 123 N.W. 2d at 98.

This court concludes that Mr. Gross' accident occurred in the transaction of business for the ASCS. He was traveling for the sole purpose of serving government business; he was traveling on the most direct route between the county ASCS office in Mitchell, South Dakota, and his assigned duty station in Freeman; he was using an expressly authorized means of transportation; he was driving during regular working hours, and he was being paid his regular salary plus mileage at the time of the accident. Mr. Gross was acting within the scope of his employment for the ASCS at the time of the accident. This result is consistent with South Dakota law on scope of employment previously noted.

II. THE PLAINTIFF'S CLAIM IS UNTIMELY.

As the defendant named was a federal employee acting within the scope of his employment at the time of the automobile accident, the plaintiff's exclusive remedy is against the United States under the Federal Tort Claims Act. 28 U.S.C. section 2679(b). Section 2675(a) of the Federal Tort Claims Act requires as a jurisdictional prerequisite that any claim must first be presented to the appropriate administrative agency and denied. This administrative claim must be presented "to the appropriate federal agency within two years after such claim accrues". 28 U.S.C. section 2401(b); Meeker v. United States, 435 F. 2d 1219 (8th Cir. 1970); West v. United States, 592 F. 2d 487, 492 (8th Cir. 1979).

The plaintiff's administrative claim was filed with the Department of Agriculture more than two years after the

accident occurred. The plaintiff argues, however, in this action that the time of accrual should not be the date of the accident and injury but the date he first discovered that the defendant was acting as a federal employee on federal business at the time of the accident. Determining when a particular federal tort claim accrues is a matter of federal law which must be determined by the court in light of the surrounding circumstances. United States v. LePatourel, 593 F. 2d 827, 830 (8th Cir. 1979): Steele v. United States, 599 F. 2d 823, 826 (7th Cir. 1979).

The general rule under the Act has been that a tort claim for personal injury or property damage resulting from the negligent operation of a motor vehicle by a government employee accrues at the time of the injury "when the injury coincides with the negligent act and some

damage is discernible at that time." Steele v. United States, 599 F. 2d 823, 828 (7th Cir. 1979); Mendiola v. United States, 401 F. 2d 695, 697 (5th Cir. 1968). However, the courts have recognized that there are circumstances when a claim accrues at a later time. For example, in medical malpractice actions where the injury and the cause are not immediately known and actions where new law applied retroactively has created a new basis for a claim, the time of accrual has been postponed. Neely v. United States, 546 F. 2d 1059, 1069 (3rd Cir. 1976); United States v. LePatourel, 593 F. 2d 827, 830 (8th Cir. 1979); United States v. Kubrick, 48 U.S.L.W. 4033 (1979). In these types of cases it is stated that a claim accrues against the government under the Act when the plaintiff discovers or in the exercise of reasonable diligence should have discovered the essential elements of

his possible cause of action. Bridgford v. United States, 550 F. 2d 978, 981-82 (4th Cir. 1977); Quinton v. United States, 304 F. 2d 234, 240 (5th Cir. 1962).

There is no basis, however, for a categorical exception to rule 2401(b) where the plaintiff is not at the outset aware of the defendant's employment status. And under the circumstances of this case, this court does not find it justified to extend the accrual date when the plaintiff knew all the essential facts of the case except the fact that the government was vicariously liable under the Federal Tort Claims Act for Mr. Gross' allegedly negligent actions.

Similar results have been reached in other cases. In West v. United States, 592 F. 2d 487, 492 (8th Cir. 1979), the accrual date of a medical malpractice claim was determined to be the date upon which the plaintiffs learned of the injury and its

cause and not the date when the status of the doctor as a federal employee acting within the scope of employment was discovered. As any administrative claim would be untimely, the case was totally barred. In Baker v. United States, 341 F. Supp. 494 (D. Md. 1972), neither the plaintiff nor anyone else connected with the matter including the employee and representatives of his insurance company realized that at the time of the accident the employee was acting within the scope of federal employment. Upon discovery of such information more than two years after the accident, the case was removed to federal court and dismissed. In Steele v. United States, 599 F. 2d 823 (7th Cir. 1979), the tort claim against the Federal Aviation Administration was found to accrue at the time of the injury even though the plaintiff was unaware at that time that an agency of the United States was the party

allegedly negligent in failing to warn of the remote power switch which caused the electrical shock to the plaintiff. This case was also dismissed for failure to file a timely administrative claim. In Lien v. Beehner, 453 F. Supp. 604 (N.D.N.Y. 1978), the court refused to toll the two year limitation period running from the time of the injury and damage solely because the government employment of the defendants was shielded from both the plaintiff and the public. The court in Driggers v. United States, 309 F. Supp. 1377, 1379 (D.S.C. 1970), also rejected the contention that an administrative claim is not required to be filed within two years from the date of the accident because the status of the defendant as a government employee acting in the course of his employment was not clearly known to the plaintiff.

This is not a case where the

government is found to have "lull(ed) plaintiffs into a false sense of security" by deliberately waiting until two years after an accident before substituting the United States as a party for the individual employee and then removing the state case to federal court and seeking dismissal. E.g., Kelley v. United States, 568 F. 2d 259 (2d Cir. 1978), cert. den. 439 U.S. 830; West v. United States, 592 F. 2d 487, 493 (8th Cir. 1979). In the present case no action was commenced by the plaintiff until after two years from the time of the accident. Nor can the government's or its employee's silence before the commencement of suit or the filing of an administrative claim be seen to estop the two year limitation period or affect the accrual date. There is no assertion of any active or deliberate concealment and the plaintiff has acknowledged that he knew Mr. Gross was em-

ployed by the ASCS. In 1974 Mr. Gross had aided his neighbor, Mr. Wollman, in obtaining a job as a part-time crop appraiser with the State ASCS. Furthermore, the limitation period of section 2401(b) is jurisdictional and not subject to estoppel. Best Bearings Co. v. United States, 463 F. 2d 1177 (7th Cir. 1972); Lien v. Beehner, 453 F. Supp. 604, 606 (N.D.N.Y. 1978).

The application of the two year statute of limitations under the Federal Tort Claims Act may result in hardship to plaintiffs in those cases where meritorious claims are barred. Nevertheless, it must also be remembered that the statutes are designed to protect defendants from bearing the burden of defending against stale claims. As recently stated by the United States Supreme Court, "Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context

of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims. We should regard the plea of limitations as a meritorious defense, in itself serving a public interest." United States v. Kubrick, 48 U.S.L.W. 4030, 4032 (1979).

Accordingly, the plaintiff's motion to remand this case to state court is denied and the motion of the United States for dismissal is granted. Counsel for the United States is directed to prepare an order in accordance with this opinion.

Done and entered at Sioux Falls, South Dakota, this 20th day of February, 1980.

BY THE COURT:

FRED J. NICHOL
Chief Judge

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

DAVID WOLLMAN, CIV 79-4031

Plaintiff, ORDER

vs.

JAKE GROSS, JR.,

Defendant.

Pursuant to the Plaintiff's Motion to Remand and the Motion of the United States to Dismiss, and based upon all the files and records herein,

IT IS HEREBY ORDERED:

1. That the Plaintiff's Motion to Remand to State Court is denied;

2. That the Motion of the United States to Dismiss is granted.

Dated this 21st day of February, 1980.

BY THE COURT:

FRED J. NICHOL
Fred J. Nichol,
Chief Judge

ATTEST:

WILLIAM J. SRSTKA, Clerk

By DeANN NOTEBOOM
Deputy

NOTICE OF ENTRY

Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 21st day of February, 1980.

WILLIAM J. SRSTKA
Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

David M. Wollman, Plaintiff,

vs.

Jake Gross, Jr., Defendant.

No. 80-1204

Sept. Term, 1980

CIV-79-4013

APPEAL FROM the United States District Court for the District of South Dakota.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the District of South Dakota and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the said District Court, in this case, be, and the same is hereby, affirmed in accordance with the opinion of

this Court.

Costs taxed in favor of Appellee: December 31, 1981

Costs of reproducing five copies of brief:	$25.50
Total costs of Appellee for recovery from Appellant in the U.S. District Court:	$25.50

A true copy

ATTEST: Robert D. St. Vrain 4/17/81

Clerk, U.S. Court of Appeals, 8th Circuit

NOTICE OF ENTRY

Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 20th day of April, 1981.

William F. Clayton, Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1204

David M. Wollman, Appellant,	*	
v.	*	Order Denying Petition for Rehearing En Banc
Jake Gross, Jr., Appellee.	*	

Filed: April 9, 1981

ORDER

The petition for rehearing en banc is denied by an equally divided vote. Chief Judge LAY, joined by Judges BRIGHT, McMILLIAN and ARNOLD vote for rehearing en banc.

LAY, Chief Judge, dissenting with whom BRIGHT, McMILLIAN and ARNOLD, Circuit Judges, join.

The facts of this case amply demonstrate that a gross injustice has resulted from the court's rigid application of the statute of limitations under the

Federal Tort Claims Act. As Judge Adams points out in his dissent to the panel opinion, Congress could not have intended the result now endorsed by four judges of this court. Wollman, injured in a car accident by Gross, diligently pursued his claim with Gross' insurer, which immediately reimbursed Wollman for damages to his car. Wollman then filed suit for his personal injuries well within the time of the three year state statute of limitations. Neither Wollman nor Gross knew that Wollman's exclusive remedy was against the United States. Wollman was never informed that Gross was acting within the scope of his governmental duties at the time of the accident. Wollman was literally lulled into a sense of false security by Gross and his insurer who negotiated his claim with him, perhaps in good faith, for over two years.

Gross and his insurer, not Woll-

man, were the ones who slept on their rights. Gross and his insurer did not report the accident to the Government or deliver Wollman's claim to the Government as required by 28 U.S.C. § 2679 (c) and 28 C.F.R. § 15.1.[1] Wollman did not learn of

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[1] 28 C.F.R. § 15.1 (a) provides in part:

> (a) Any Federal employee against whom a civil action or proceeding is brought for damages to property, or for personal injury or death, on account of the employee's operation of a motor vehicle in the scope of his office or employment with the Federal Government . . . shall promptly deliver all process and pleadings served upon the employee, or an attested true copy thereof, to the employee's immediate superior or to whoever is designated by the head of the employee's department or agency to receive such papers. If the action is brought against an employee's estate this procedure shall apply to the employee's personal representative. In addition, upon the employee's receipt of such process or pleadings, or any prior information regarding the commencement of such a civil action or proceeding, he shall immediately so advise his superior or the designee thereof by telephone or telegraph. The superior or designee shall furnish the United States Attor-

the Government's interest in his suit until Gross filed an amended answer on February 21, 1979, asserting his status as a Government employee.[2]

We should hear this case en banc for at least two reasons. First, we should reconsider Meeker v. United States, 435 F. 2d 1219 (8th Cir. 1970), and its progeny in light of Kelley v. United States, 568 F. 2d 259 (2d Cir. 1978), cert. denied, 439 U.S.

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ney for the district embracing the place wherein the action or proceeding is brought and the Chief of the Torts Section, Civil Division, Department of Justice, information concerning the commencement of such action or proceeding, and copies of all process and pleadings therein. (Emphasis added.)

[2]Gross' insurer might have been required to pay for Wollman's injuries if Wollman had timely pursued his exclusive federal remedy against the United States, and, subsequently, the United States sought indemnity from the insurer. See Southern Farm Bureau Cas. Ins. Co. v. United States, 395 F. 2d 176 (8th Cir. 1968).

In the name of protecting the

830 (1978). I sense that the analysis in Kelley demonstrates that Meeker (an opinion in which I participated) was wrongly decided. The filing of the suit against the individual employee in state court should satisfy the exhaustion requirement under the F.T.C. A.[3] As the Second Circuit so cogently observed:

> United States against stale claims, the panel has reached a result the benefits of which inure primarily to private insurers. In cases where the insurer would not have to indemnify the United States for payments made to the victim, the insurer would almost always inform the claimant that the proper and exclusive remedy was against the United States. The claimant could then process a timely claim against the United States. The result in this case does not benefit the United States to any great extent because in those cases where the insurer has a reason for lulling the claimant into sleeping on his or her rights the United States would probably be indemnified by the insurer for payments made to the victim. Regardless of whether or not the insurer intentionally misled Wollman, a gross injustice has resulted.

[3] See also Judge Bright's concurring opinion in Melo v. United States,

> The [Meeker] court reasoned that subdivision (d) of Section 2679 effectuated the exclusive remedy purpose of subdivision (b) of the section by providing that upon the certification and removal of the suit against the employee to the federal court, the proceedings shall be "deemed a tort action brought against the United States under the provisions of this title and all references thereto." Again, the language relied on does not support the conclusion. It is far truer to the language to read it as implying that the removed case is to continue to judgment on the merits as a tort case against the United States subject to only one condition: that it is not found on pretrial motion that the employee was acting beyond the scope of his employment (Carr v. United States, 4th Cir. 1970, 422 F. 2d 1007, 1010), in which event the case is remanded. Cases have held, too, that the commencement of an action against the employee cannot be treated as the equivalent of filing a claim against the United States. See Best Bearings Co. v. United States, 7th Cir. 1972, 463 F. 2d 1177, 1179; Meeker v. United States, supra, 435 F. 2d at 1221; Smith v. United States, supra, 328 F. Supp. at 1226. But even if that were requisite in a case started against the federal employee in the state court, no persuasive reason for not considering the service of the complaint to be an adequate claim-making appears: Section 2679 (e) and 28 C.F.R. § 15.1 assure the prompt presentation of the process

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505 F. 2d 1026, 1030 (1974).

> and pleadings to appropriate officers of the Government, and if there is, as here, an occasional failure of transmission, it is not apparent that the consequence should be visited on the plaintiff.

Kelley v. United States, 568 F. 2d at 267-68.

Second, the court en banc should reexamine the facts of this case in light of the legal principles set forth in United States v. Kubrick, 444 U.S. 111 (1979). I cannot accept the distinction the panel makes of LePatourel from the facts existing here. LePatourel was commenced after the two year statute of limitations under the F.T.C.A. The plaintiff did not know that the driver (a United States District Judge) could be sued under the F.T.C.A. because our court had never so held. Yet the plaintiff as well as many of the lawyers he consulted knew the driver was returning to his home from duty when the accident occurred. Here the plaintiff did not know that the driver could be sued under the F.T.C.A. until

February 1979, and as to the statute of limitations issue there is no compelling reason why we should not reach the same result as in LePatourel. Moreover, Judge Adams has sufficiently detailed how the principles of Kubrick are facially distinguishable from the facts here.

I raise one other question. It is the United States that has intervened in the state court, substituting itself in place of the individual employee. When it does so, at a date past the time of the statute of limitations, it seems that a realistic interpretation of subsections 2679 (b) and (d) would require the Government to take the original suit as it finds it; the original suit should be deemed to have been initiated against the United States for purposes of determining whether it was brought within the proper statute of limitations. Cf. Henderson v. United States,

429 F. 2d 588 (10th Cir. 1970); Whistler v. United States, 252 F. Supp. 913 (N.D. Ind. 1966). A party may waive the statute of limitations. In this regard the United States, although not subject to the doctrine of estoppel, should not be treated any differently from any other party. If the Government voluntarily chooses to stand in the shoes of another, it should assume all rights and liabilities existing. If the employee had failed to report the lawsuit to the governmental agency under 28 C.F.R. § 15.1 and the suit had proceeded to judgment against the employee individually, there would have been no recourse by the employee against the Government. Under these circumstances the plaintiff could proceed for collection against the employee and his insurer. It is incongruous to hold that an employee who belatedly reports to the Government may totally prejudice an injured

innocent party.

I do not attempt to resolve these questions. My concern is that this case presents a gross injustice and is much more deserving of en banc consideration then many cases which somehow reach our en banc docket. In any event, assuming no judicial relief is forthcoming, the statute as presently construed cries out for legislative amendment to obviate continuing unfairness to unknowing tort victims of the Government.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

28 U.S.C. §1346(b)

(b) Subject to the provisions of chapter 171 of this title [28 USCS §§2671 et seq], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.2401

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) a [A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, or notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. 2671

As used in this chapter [28 USCS §§2671 et seq] and sections 1346 (b) and 2401 (b) of

this title [28 USCS §§ 1346(b) and 2401(b)] the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 U.S.C.2675

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal

Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 U.S.C.2679

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against

such federal agency on claims which are cognizable under section 1346(b) of this title [28 USCS § 1346(b)], and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title [28 USCS §§ 1346(b) and 2672] for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government or any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any

court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment

at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to State court.

(e) The Attorney General may compromise or

settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 C.F.R. § 15.1(a)

(a) Any Federal employee against whom a civil action or proceeding is brought for damages to property, or for personal injury or death, on account of the employee's operation of a motor vehicle in the scope of his office or employment with the Federal Government . . . shall promptly deliver all process and pleadings served upon the employee, or an attested true copy thereof, to the employee's immediate superior or to whoever is designated by the head of the employee's department or agency to receive such papers. If the action is brought against an employee's estate this procedure shall apply to the employee's personal representative. In addition, upon the employee's receipt of such process or pleadings, or any information regarding the commencement of such a civil action or

proceeding, he shall immediately so advise his superior or the designee thereof by telephone or telegraph. The superior or designee shall furnish the United States Attorney for the district embracing the place wherein the action or proceeding is brought and the Chief of the Torts Section, Civil Division, Department of Justice, information concerning the commencement of all process and pleadings therein.

11. IMPORTANCE OF INVESTIGATION

Thorough investigation of accidents is essential to an effective safety program. Positive corrective and preventive action cannot be formulated from conjecture, hearsay, or opinion. The efficiency of the action depends upon the adequacy of the facts, the correctness of the interpretation, and the appropriateness of the remedy selected.

12. POLICY

Every reportable accident shall be investigated to determine the cause and resultant losses and to formulate measures to prevent recurrence. The initial investigation always should be made at the scene as soon as possible, to obtain facts concerning conditions

at the time of the accident, and to obtain witnesses' statements while events are fresh in their minds. The facts ascertained shall be used as the basis for analysis, review, and action by agency officials, safety officers, or other appropriate persons.

13. REPORTABLE ACCIDENT

A. (Withdrawn--Amend. 3)

B. Submission of Report. The employee involved in a reportable accident shall notify his supervisor or the head of the reporting office immediately. This may be done orally or in writing as required by the supervisor. However, if the employee is injured, he shall report the injury as required by paragraph 39.

14. SPECIAL REPORTING

A. To Personnel Offices. Each of-

fice shall report by telephone or wire immediately to the appropriate personnel office any accident that results in:

1. Death.
2. Permanent, partial or total disability,
3. Probable fatal injury.
4. Property damage in excess of $1,000.
5. Any injury to a private party. (Also report accidents which occur on Government property but do not involve agency employees.)
6. Any accident occurring on Government property, but does not involve agency employees.

B. To OGC Representative. Each office shall report by telephone

or telegram to the OGC Representative stationed nearest the scene of the accident any occurrence causing substantial property damage or serious injury to private persons. Immediate notification is necessary to protect the Government and the employee in the event of litigation. See 14-PM for addresses of the appropriate OGC office.

15. MOTOR VEHICLE ACCIDENT REPORT

A. Employee's Report.

1. Any employee involved in a motor vehicle accident while on official business shall report the accident to his supervisor within five days.

a Prepare SF-91 in an original and two copies.

b If the motor vehicle in-

volved is owned by GSA, prepare a fourth copy and send to GSA.

2. If the employee is too severely injured to complete SF-91, his supervisor shall do so and forward it with AD-278. (See paragraph 16.)

B. Motor Vehicle Accident Report Kit. Heads of offices shall furnish employees with kits (ASCS-81) containing necessary instructions and forms for use at scene of accident.

1. Extent of Distribution.

a For all Government-owned vehicles and personally-owned vehicles used regularly on official business, unless vehicle is used 3 days or less a month.

b To temporary employees serving under appointments limited to a period of several months who drive on official business several days each week.

2. Source of Supply. Form ASCS-81 is available through the AS Division. All contents of the kit should be ordered separately and assembled into completed kits prior to issuance to employees.

3. Maintenance.

a. Employees shall store kits in the vehicle used in performing official business.

b. Heads of offices shall determine that each kit is properly maintained.

C. Reporting Civil Actions Arising Out of Motor Vehicle Accidents.

1. Public Law 87-258. Provides protection against the risk of civil suits which may result from the operation of motor vehicles by federal employees on official business.

2. Personal Automobile Liability Insurance. Is needed to protect employees in the event that their actions at the time of the accident are not considered to be within the scope of official duty.

3. Notification Required When Suit is Filed. When a suit, resulting from the operation of a motor vehicle within the scope of employment is

instituted, the head of the office shall immediately notify by telephone or wire the OGC representative for the area and the PM Division. The following information shall be given them:

a. Name of court and location.

b. Date of service.

c. When case will be heard or when reply is due in court.

d. Nature of complaint (date, place, and circumstances of accident).

e. Office and location of employee involved.

f. Whether or not employee was acting in official capacity at time of

accident.

g. Whether employee carries personal property and liability insurance to cover his driving the vehicle. If so, the name of the insurance company and amount of insurance.

h. Whether employee notified his insurance company of the accident.

i. The amount of damage to the Government car, if Government car involved.

4. Reports and Documents to be Submitted. As soon as possible after the telephone or wire notification required in subparagraph 3, has been made, the head of the office

shall make a full report to be used in defense of the suit. The report shall be sent to the OGC representative and a copy to PM Division. The report should include as a minimum:

a. The nature of the driver's duties.

b. A copy of SF-91, Operator's Report of Motor Vehicle Accident.

c. A copy of each SF-94, Statement of Witness.

d. A copy of Form AD-278, Supervisor's Report of Accident.

e. Optional Form 26, Data Bearing Upon Scope of Employment of Motor Vehicle Operator.

f. All documents, such as notices, summons, process, and pleadings received by the employee in connection with the filing of the suit against him.

16. SUPERVISOR'S REPORT OF ACCIDENT (AD-278) Use this form for describing the facts of the accident to determine the causative factors and reporting the necessary corrective action. AD-278 is mandatory for all reportable accidents.

A. Responsibility for Completion. The supervisor of the employee involved shall complete this form unless another person is designated to investigate the accident.

B. Instructions for Completion. See Exhibit 2 for detailed instructions.

C. Distribution of Copies. See Exhibit 3.

D. Assistance in Investigation of Accident. See Exhibit 4.

17. TORT CLAIMS

Any ASCS accident which results in damage to property belonging to a private party, or which results in an injury to such a person, may also result in a claim against the Government. If such claims are made, they should be processed as prescribed by 56-FI.

18. ADMISSION OF LIABILITY

Motor vehicle operators shall not plead guilty in any civil action to any motor vehicle accident liability prior to notifying and consulting with the OGC representative. Supervisors shall insure that affected employees are so instructed.

19. OIG INVESTIGATIONS

All offices having an accident subject to an OIG investigation shall advise the Director, PM Division, in writing of any actions taken or recommendations made as a result of the reported findings.

A. Time for Submission. Submit no later than 40 days after receipt of the OIG report.

B. Negative Reports. Submit with reasons for decisions not to take any remedial action.

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No. 81-33

In the Supreme Court of the United States

OCTOBER TERM, 1980

DAVID M. WOLLMAN, PETITIONER

v.

JAKE GROSS, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's tort claim arising out of an automobile accident accrued under the Federal Tort Claims Act at the time of his injury, when he knew that the other driver was an employee of the Agricultural Stabilization and Conservation Service, or later, when he discovered that the other driver was acting within the scope of his federal employment at the time of the accident.

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In the Supreme Court of the United States

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No. 81-33

DAVID M. WOLLMAN, PETITIONER

v.

JAKE GROSS, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-44) is reported at 637 F. 2d 544. The order of the court of appeals denying a petition for rehearing (Pet. App. 72-81) is reported at 646 F. 2d 1306. The decision of the district court (Pet. App. 45-67) is reported at 484 F. Supp. 598.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1980, and a petition for rehearing was denied on April 9, 1981. The petition for a writ of certiorari was filed on July 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

STATEMENT

This case arises out of an accident that occurred at 4:00 p.m. on Friday, June 11, 1976, when an automobile driven

by respondent Jake Gross, Jr., a district director of the Agricultural Stabilization and Conservation Service, struck an automobile driven by petitioner David M. Wollman (Pet. App. 3). At the time of the accident, respondent was returning to his home duty station from the ASCS office in Mitchell, S.D., one of ten county offices that he supervised. Respondent failed to notify his administrative officer of the accident, and petitioner commenced negotiations with respondent's personal insurer (*id.* at 3-4). Petitioner knew at the time of the accident that respondent was employed by the ASCS. Neither he nor respondent was aware, however, that under applicable legal principles respondent was acting within the scope of his employment as a federal employee when the accident occurred and that petitioner's sole legal remedy was against the United States (Pet. App. 47, 65-66).

On January 25, 1979, more than two years after the accident, petitioner brought suit against respondent in state court (Pet. App. 4). In February 1979, counsel for respondent's personal insurer realized the possible significance of respondent's federal employment and filed an amended answer asserting that fact (*id.* at 4, 8). Thereafter, on March 23, 1979, the United States Attorney, acting pursuant to the Federal Drivers Act, 28 U.S.C. 2679(b)-(e), appeared and removed the case to the United States District Court for the District of South Dakota.[1] He then moved to dismiss the suit on the ground that petitioner's exclusive remedy was a

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[1]The Federal Drivers Act provides (28 U.S.C. 2679(b)) that a suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), is the exclusive remedy for damages "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment * * *." The Drivers Act also provides (28 U.S.C. 2679(d)) that suits instituted against federal employees in state court are to be removed by the Attorney General to federal district court after certification that the defendant was a federal employee acting within the scope of his employment at the time of the accident.

suit against the United States under the Federal Tort Claims Act and that petitioner had failed to file an administrative claim within the period established by the Act's limitations provision, 28 U.S.C. 2401(b). Petitioner filed an administrative claim with the Department of Agriculture on July 16, 1979, and shortly thereafter moved to remand the case to state court (Pet. App. 4).

The district court granted the government's motion to dismiss and denied petitioner's motion to remand. It found that respondent was a federal employee acting within the scope of his employment at the time of the accident and that petitioner's claim was time-barred under 28 U.S.C. 2401(b), which requires that the administrative claim be filed with the appropriate federal agency "within two years after such claim accrues" (Pet. App. 49-67).

The court of appeals affirmed, rejecting petitioner's argument that under the doctrine of "blameless ignorance" his tort claim against the United States did not accrue until February 1979, when respondent filed his amended answer in the state court raising the issue of his federal employment. The court observed (Pet. App. 14) that petitioner "was aware at the time of the accident that Gross was employed by the ASCS" and that "[h]e was unaware only of the legal significance of this fact." The court concluded (*ibid.*) that even if the "blameless ignorance" doctrine applied, petitioner should not prevail, because under *United States* v. *Kubrick*, 444 U.S. 111 (1979), the accrual period could not be postponed until a plaintiff recognized the "legal ramifications" of the facts.

The court of appeals also found no basis in the record or in petitioner's allegations for concluding that either respondent or the United States had engaged in actions designed to "lull [petitioner] into a false sense of security" (Pet. App. 18). Since the state court suit was filed more than two years after the accident, no delay on the part of the United States to

remove the case and have it dismissed could possibly have affected petitioner's rights (*id.* at 16-18).

An equally divided court denied petitioner's petition for rehearing en banc (Pet. App. 72-81).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with decisions of this Court or of other courts of appeals. Accordingly, further review of this unusual fact situation is not warranted.

1. Petitioner contends (Pet. 17-18, 21-22) that the decision below is inconsistent with *United States* v. *Kubrick, supra*. In fact, *Kubrick* squarely supports that decision.

As a general rule, a claim under the Federal Tort Claims Act "accrues at the time of the plaintiff's injury." *United States* v. *Kubrick, supra*, 444 U.S. at 120. A number of courts have held, however, that in medical malpractice cases, where the injury may not manifest itself until long after it has been inflicted, the claim may be deemed to accrue only later, when the victim discovers both the injury and its cause. *Id.* at 120-121 & n.7. Even assuming that this "discovery" rule applies in cases turning on the employment status of the federal tortfeasor[2], petitioner's claim was properly dismissed as time-barred.

In *Kubrick*, this Court rejected the notion that the accrual of a claim under the Federal Tort Claims Act may be postponed until the victim knows not only the facts of his injury and its cause but also their legal significance. In

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[2]Courts have not, however, extended the discovery rule to cases in which the plaintiff is unaware only of the employment status of the federal employee defendant. See, *e.g.*, *West* v. *United States*, 592 F. 2d 487 (8th Cir. 1979); *Baker* v. *United States*, 341 F. Supp. 494 (D. Md. 1972); *Lien* v. *Beehner*, 453 F. Supp. 604 (N.D.N.Y. 1978); *Dunaville* v. *Carnago*, 485 F. Supp. 545, 548 (S.D. Ohio 1980).

accordance with *Kubrick*, the court of appeals correctly held that petitioner's claim was time-barred, concluding (Pet. App. 17 n.6) that it is not "unreasonable to expect [petitioner], who was aware that [respondent] was an ASCS employee, to so inform his counsel, or for counsel to then research the status of ASCS employees for consideration of an FTCA claim."[3] As the Court observed in *Kubrick* (444 U.S. at 124), the two-year limitations period is designed for such inquiries into the "legal implications" of known facts.[4]

2. Contrary to petitioner's contention (Pet. 14-17), the decision below does not conflict with *Kelley* v. *United States*, 568 F. 2d 259 (2d Cir.), cert. denied, 439 U.S. 830 (1978). In *Kelley*, the plaintiffs had filed their state court suit *within* the two-year period for filing claims under the Federal Tort Claims Act. The district court denied the government's motion to dismiss the complaint on the

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[3]Because there would have been no obstacle to a timely invocation of the federal remedy had the employment status question been promptly explored, petitioner's reliance (Pet. 21) on *United States* v. *LePatourel*, 593 F. 2d 827 (8th Cir. 1979), is misplaced, even assuming that *LePatourel* survives *Kubrick* and that resolution of an intra-circuit conflict is a proper use of the writ of certiorari. In *LePatourel*, a suit against a federal judge who was driving on official business when he struck the claimants' car, the limitations period was deemed not to commence until the court had decided a "novel question of federal law"—whether federal judges are federal employees for purposes of the Federal Tort Claims Act. There was no such novel legal question in the present case.

[4]There is no merit to petitioner's contention (Pet. 18-19), which echoes Judge Adams' dissent (Pet. App. 27-29), that he was unaware of a "critical fact" until February 1979, namely that respondent was acting in the scope of his federal employment. Petitioner does not contend that he was unaware that respondent, a life-long neighbor, was a federal employee who drove to the various county offices he supervised or that the accident occurred during a weekday afternoon. His argument is essentially that he did not know that such use of respondent's personal automobile could be considered action within the scope of federal employment: this is a legal question of precisely the sort that is to be analyzed and resolved by a plaintiff *within* the limitations period.

ground that the government had, after the filing of the suit, "lull[ed] plaintiffs into a false sense of security by waiting until plaintiffs' time to file an administrative claim had expired and thereupon move to be substituted and to dismiss." 568 F. 2d at 262. The Second Circuit affirmed on the grounds that the administrative claim requirement in the Federal Tort Claims Act does not apply to suits governed by the Federal Drivers Act. As to those, the court reasoned, the state court suit against the federal employee, who should inform his federal employer, functions as an equivalent form of notice. *Id.* at 264-266. The Second Circuit also stated that the removed case should simply be considered a continuation of a properly filed state court case, subject only to the condition that it be remanded if it is determined that the accident did not occur within the scope of federal employment. *Id.* at 268.

As noted above, the plaintiffs' suit in *Kelley* was commenced *within* the two-year period for the filing of claims under the Federal Tort Claims Act. Accordingly, the Second Circuit did not decide the issue resolved by the court below—whether a state court suit commenced against a federal employee within the state limitations period but *more than* two years after the claim accrued would be time-barred under 28 U.S.C. 2401(b). 568 F. 2d at 268.

In our view, *Kelley* was wrongly decided because the filing of an administrative claim within the two-year federal limitations period is a prerequisite for all tort suits against the United States, including suits originally brought against federal drivers in state court. We thus believe that the correct rule was stated in *Meeker* v. *United States*, 435 F. 2d 1219 (8th Cir. 1970). But this is not an appropriate case in which to resolve the conflict between those cases because petitioner, unlike the plaintiffs in *Kelley*, filed even his state court suit outside the period for filing an administrative

claim with the appropriate federal agency. Hence, petitioner's state court suit was inadequate as a substitute for compliance with the administrative claim requirement. Since the Second Circuit did not decide whether a federal claim would be barred in such circumstances, there is no conflict to resolve in this case.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1981

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[5]There is no merit to petitioner's contention (Pet. 22), in reliance on Judge Lay's dissent from the denial of the petition for rehearing en banc (Pet. App. 79-80), that the limitations provision of the Federal Tort Claims Act should be deemed waived by the United States Attorney's act of substituting the United States for respondent after the limitations period had expired. The limitations period is a condition on the liability of the United States that must be strictly observed. *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). It cannot be waived by the action of the United States Attorney. See *Munro* v. *United States*, 303 U.S. 36, 41 (1938).

Moreover, by choosing to intervene, the United States Attorney cannot be said "to take the original suit as [he] finds it" (Pet. App. 79). The United States Attorney is under a statutory duty to substitute the United States for a federal driver. See 28 U.S.C. 2679(d). Because petitioner did not bring suit in state court until more than two years had elapsed after the accident, there can be no claim in this case that the motion to substitute was delayed for tactical reasons.

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NO. 81-33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DAVID M. WOLLMAN, PETITIONER

V.

JAKE GROSS, JR., RESPONDENT

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

* *

PETITIONER'S REPLY BRIEF

PER RULE 22.5

* *

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QUESTIONS PRESENTED FOR REVIEW

I.

The Court of Appeals did misapply the Kubrick decision, since the purpose of the F.T.C.A. two-year limitations period is to prod claimants into inquiries about the "legal implications" of known not unknown "critical facts"; further, that, therefore, the panel decision in the instant case conflicts with U.S. vs. Kubrick, 444 U.S. 111 (1979).

II.

This is an appropriate case in which to resolve the conflict between Kelley (Second Circuit) and Meeker (Eighth Circuit).

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1. The Court of Appeals did misapply the Kubrick decision, since the purpose of the F.T.C.A. two-year limitations period is to prod claimants into inquiries about the "legal implications" of known not unknown "critical facts"; further, that, therefore, the panel decision in the instant case conflicts with U.S. vs. Kubrick, 444 U.S. 111 (1979). . . 3

2. This is an appropriate case in which to resolve the conflict between Kelley vs. United States, 568 F 2d 259, Cert. Denied 439 US 830, and Meeker vs. United States, 435 F 2d 1219 (8th Cir. 1970) . 5

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LIST OF ALL PARTIES TO THE PROCEEDING

1. David M. Wollman, Plaintiff and Petitioner.
2. Jake Gross, Jr., Defendant (Federal Employee).
3. United States of America, Substituted Defendant.
4. Western Casualty and Surety Company, Fort Scott, Kansas, (the private insurer of Jake Gross, Jr.) appearing by permission of the district court through Timothy J. Nimick, Attorney at Law, Sioux Falls, South Dakota. While the private insurer is technically not a named party, its interest was acknowledged by the district court and Mr. Nimick was given standing to appear in the courts below.

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The petitioner relies upon its statement of grounds contained on page 3 of the Petition for Writ of Certiorari previously filed in this matter.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS WHICH THE INSTANT CASE INVOLVES ARE CITED AS FOLLOWS: None

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY (SHOWING JURISDICTION IN DISTRICT COURT)

II. FACTS

The petitioner incorporates herein by reference its statement of the case contained on pages 5-13 of his Petition for Writ of Certiorari previously filed in this matter.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS DID MISAPPLY THE KUBRICK DECISION, SINCE THE PURPOSE OF THE F.T.C.A. TWO-YEAR LIMITATIONS PERIOD IS TO PROD CLAIMANTS INTO INQUIRIES ABOUT THE "LEGAL IMPLICATIONS" OF KNOWN NOT UNKNOWN "CRITICAL FACTS"; FURTHER, THAT, THEREFORE, THE PANEL DECISION IN THE INSTANT CASE CONFLICTS WITH U.S. VS. KUBRICK, 444 U.S. 111 (1979).

The Respondent in Opposition, the United States, admits in its brief that Kubrick stands for the proposition that the two-year limitations period is designed for barring inquiries into the "legal implications" of known facts, but not of "critical facts" which were unknown and could not with reasonable diligence have been discovered within the two-year limitations period. (See R.O.B. page 5) What the Respondent in

Opposition has failed in this case to recognize is the all important distinction that it is not the permanent employment status of the defendant, Jake Gross, Jr., that petitioner did not know, but rather the status of the defendant as of the time of the accident. In other words, the plaintiff did not know the "critical fact" that the defendant had been working in the scope of his Federal employment an hour prior to the accident, which fact resulted in the defendant's being found to be within the scope of his Federal employment an hour later at the time of the accident. It is worthy of note that the Trial Judge stated in his opinion that there were no analogous South Dakota cases on point on the scope of employment question.

The rule as stated in Kubrick addresses fact situations where all of the critical facts are known. The rule, therefore, does not apply in this case. We are

not talking herein about a plaintiff who does not know the legal implication of a known fact, we are talking about a plaintiff who does not know the fact, itself, which would give rise to the legal implication. Kubrick did not address that issue.

2. THIS IS AN APPROPRIATE CASE IN WHICH TO RESOLVE THE CONFLICT BETWEEN KELLEY VS. UNITED STATES, 568 F 2d 259, Cert. Denied 439 US 830, AND MEEKER VS. UNITED STATES, 435 F 2d 1219 (8th Cir. 1970).

The Respondent in Opposition contends that this is an inappropriate case to resolve the aforementioned conflict between the controlling precedents of the Second Circuit Court of Appeals and the Eighth Circuit Court of Appeals due to factual differences between the Kelley case upon which petitioner relies in part and the instant case.

It is extremely important to note that the Respondent in Opposition admits, at page 6 of its brief, that Kelley conflicts with Meeker.

The Respondent in Opposition urges in its brief that the fact that the State Court case in Kelley, supra, was commenced within the two-year period following the injury was the controlling fact in the Kelley case and that the rule in Kelley, therefore, would not apply to the instant case. The said fact, however, was completely immaterial to the blameless ignorance doctrine as expressed in the Kelley case and upon which petitioner relies.

Kelley stood essentially for two main propositions:

1. That the filing of a suit against an individual employee in State Court should satisfy the exhaustion requirement under the F.T.C.A.

2. That blameless ignorance on the part of a reasonably diligent plaintiff is a sufficient reason to postpone the accrual of the F.T.C.A. statute of limitations.

Judge Lay stated in his dissent to the Eighth Circuit's denial of a rehearing en banc:

> I sense that the analysis in Kelley demonstrates that Meeker (an opinion in which I participated) was wrongly decided. The filing of the suit against the individual employee in state court should satisfy the exhaustion requirement under the F.T.C.A.

Judge Lay, and the three judges joining with him in his aforementioned dissent, as well as Judge Adams in his dissent to the panel opinion in the instant case, thought the fact that the instant case was brought more than two years after the injury was totally unimportant and immaterial in construing the rule in Kelley.*

*See Appendix pp 31-34, including footnote #5, and Appendix pp 75-78.

Stressed most heavily, however, in petitioner's argument is the second proposition of Kelley, which is stated above. This proposition in Kelley may be read consistently with Kubrick, supra, and with United States vs. LePatourel, 593 F 2d 827 (8th Cir. 1979) (en banc). The Respondent in Opposition has largely ignored that fact.

In summary on this point there is strong authority for the proposition that Kelley strongly and directly contravenes Meeker, contrary to the irrelevant distinctions drawn by Respondent in Opposition between those two cases. Furthermore, Kelley, Kubrick and LePatourel strongly conflict with the panel decision in the instant case as stated above, and arguably with Meeker.

CONCLUSION

Guidance should be provided by the Supreme Court by resolving the confusion between the various cases, including, but not by way of limitation, deciding whether or not the rule in Kubrick goes beyond medical malpractice cases or is limited thereto (as suggested by the Government), and, therefore, the Petition for Writ of Certiorari should be granted.

Respectfully submitted this 18th day of September, 1981.

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